

9:00 AM
12/8/11

ASSIGNMENT AND ASSUMPTION AGREEMENT
(DWR-IRWM Stormwater Flood Management Grant Program)

(Fancher Creek Flood Control Improvements)

This Assignment/Assumption Agreement (this "Assignment"), dated for convenience as of December 14, 2011, is entered into between the CITY OF FRESNO, a California municipal corporation (herein referred to as "Assignor") and the FRESNO METROPOLITAN FLOOD CONTROL DISTRICT (FMFCD), a California public corporation (herein referred to as "Assignee"), as consented to by the CALIFORNIA DEPARTMENT OF WATER RESOURCES (herein referred to as "DWR") (sometimes Assignor and Assignee will be collectively referred to hereinafter as the "parties").

Recitals

A. Pursuant to its Resolution No. 2011-66, the Assignor has submitted its April 15, 2011 application, attached hereto and incorporated herein by this reference (Application) to the DWR to obtain Stormwater Flood Management Grant Program (Program) funding for the Fancher Creek Flood Control Improvements Project (Project), whereunder Project improvements are to be accepted by the Assignee upon completion; and

B. On or about September 21, 2011 DWR informed Assignor and Assignee of its intent to award grant funds in the amount of \$2,231,086.00 subject to execution of a grant agreement; and

C. Assignor desires to assign the Application including all rights, obligations and liabilities thereunder to Assignee and Assignee desires to assume such from Assignor, upon the terms and conditions hereunder; and

D. Assignee understands that upon assignment of the Application hereunder, Assignee will be solely responsible for executing any grant agreement required by the DWR for delivery of grant funds and will be solely responsible for complying with all of the terms of said grant agreement; and

C. DWR is willing to consent to such assignment and assumption of the Application in the public interest, upon the terms and conditions herein.

NOW THEREFORE, for good and valuable consideration, the receipt and adequacy of which are acknowledged, Assignor and Assignee agree as follows:

Section 1. Assignment of Application.

Assignor, from and after the effective date, assigns and transfers to Assignee, and Assignee accepts all right, title, interest and obligations in and to the Application subject to the terms and conditions set forth in this Assignment. Assignor and Assignee, without waiver or limitation, jointly and severally agree to take any and all action required to bind Assignee to the Application and all applicable attachments thereto including the Application documents, certifications and assurances, as may be requested by DWR and within the reasonable time frames specified by DWR.

Section 2. Assumption of Obligations under the Agreement.

Assignee, from and after the effective date, assumes and agrees to perform and fulfill the terms, covenants, conditions, and obligations required to be performed and fulfilled by Assignor under the Application, including the obligation to enter into a grant agreement with DWR in order for DWR to deliver the awarded grant funds to the Assignee. Assignee further agrees that it will be solely responsible for complying with all terms and conditions of any grant agreement related to the Application entered into with the DWR, and that the City will have no obligations or responsibility to comply with any terms and conditions of any such grant agreement.

Section 3. Assignor's Covenants.

Assignor covenants that this Assignment constitutes the only assignment it has entered with regard to the rights it possesses under the Application.

Section 4. Litigation Costs.

If any litigation arises out of this Assignment or concerning the meaning or interpretation of this Assignment, the Assignee shall pay for costs and expenses of Assignor with respect to this litigation, including without limitation, reasonable attorneys' fees.

Section 5. Indemnification.

Assignee indemnifies and holds harmless Assignor from and against any loss, cost, or expense, including attorneys' fees relating to the Application including without limitation the Program, the Project, Project funding, Project match funding, and any failure of Assignee to fulfill obligations under the Application or under any grant agreement related to the Application entered into between the Assignee and DWR.

Section 6. Successors and Assigns.

This Assignment shall be binding on and inure to the benefit of the parties to it, their heirs, executors, administrators, successors in interest, and assigns.

Section 7. Governing Law.

This Assignment shall be governed by and construed in accordance with California law.

Section 8. Effective Date.

This Assignment shall be effective on the date

- (i) the Assignor's Council approves it, and
- (ii) its complete execution by the Assignor and the Assignee, and
- (iii) DWR consents to it.

Section 9.

This Assignment represents the entire and integrated agreement between the parties with respect to the subject matter hereof and supersedes any and all prior negotiations, representations or agreements, either written or oral.

Section 10. HUD Provisions.

In no event shall DWR have any liability under the terms of this Assignment.

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IN WITNESS WHEREOF, the parties have executed this Assignment.

ASSIGNOR:
CITY OF FRESNO,
a California municipal corporation

By: 
(Attach notary certificate of acknowledgment)

Name: Scott Mozier

Title: City Engineer / Assistant Director

Date: 12-23-2011

ASSIGNEE:
FRESNO METROPOLITAN FLOOD
CONTROL DISTRICT, a California public
corporation

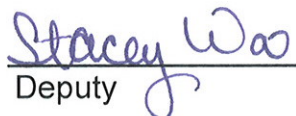
By: 
(Attach notary certificate of acknowledgment)

Name: Boon Van Wyk


Title: General Manager, Secretary

Date: 12-14-11

ATTEST:
REBECCA E. KLISCH
CITY CLERK

By:  1-10-12
Deputy Date


APPROVED AS TO FORM:
JAMES C. SANCHEZ
CITY ATTORNEY

By:  12/23/2011
John Fox Date
Senior Deputy

CONSENT BY THE CALIFORNIA DEPARTMENT OF WATER RESOURCES

The CALIFORNIA DEPARTMENT OF WATER RESOURCES consents to the Assignment to Assignee of the Application hereinabove referenced and attachments thereto and documents and certifications therein, and upon such assignment and assumption Assignor shall be automatically released from any and all obligations and liabilities whatsoever under the Application.

California Department of Water Resources

By: 

Name: TACIE L. BILLINGTON

Title: CHIEF, FINANCIAL ASST. BRANCH

Date: 2/7/12

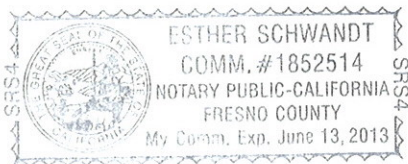
Attachment : Application

CALIFORNIA ALL-PURPOSE ACKNOWLEDGEMENT

State of California }
 } ss.
County of Fresno }

On *December 15, 2011*, before me, *Esther Schwandt*, Notary Public, personally appeared *Bob Van Wyk*, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.



Notary Name: *Esther Schwandt*
Commission #: *1852514 Fresno County*

WITNESS my hand and official seal.

A handwritten signature in blue ink, appearing to read 'Esther Schwandt', written over a horizontal line.

Notary Phone: *(559) 456-3292*
My Commission Expires: *June 13, 2013*

OPTIONAL

Description of Attached Document

Title or Type of Document: *Assignment and Assumption Agreement*

Document Date: *December 14, 2011*

Number of Pages: *3*

Signer Other Than Named Above: *John Fox*

Capacity Claimed by Signer

Signer's Name: *Bob Van Wyk*

Corporate Officer – Title: *General Manager/Secretary*

Signer is Representing: *Fresno Metropolitan Flood Control District*

Original document bears my embossment

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California

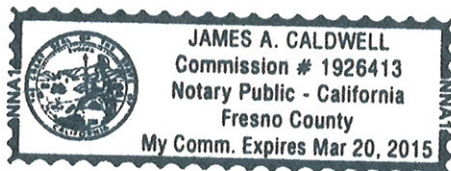
County of FRESNO

On 1-06-2012 before me, JAMES A. CALDWELL, NOTARY PUBLIC,
Date Here Insert Name and Title of the Officer

personally appeared SCOTT MOZIER

Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.



Place Notary Seal Above

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature

James A Caldwell

Signature of Notary Public

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: _____

Document Date: _____ Number of Pages: _____

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name: _____

- ☐ Individual
☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General
☐ Attorney in Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____

Signer Is Representing: _____

RIGHT THUMBPRINT
OF SIGNER
Top of thumb here

Signer's Name: _____

- ☐ Individual
☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General
☐ Attorney in Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____

Signer Is Representing: _____

RIGHT THUMBPRINT
OF SIGNER
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December 8, 2011

AGENDA ITEM NO. 9:00am A

COUNCIL MEETING 12/8/11

APPROVED BY

DEPARTMENT DIRECTOR

CITY MANAGER

FROM: PATRICK N. WIEMILLER, Director
Public Works Department

BY: EFREN BAÑUELOS, Assistant Director
Public Works Department, Capital Management Division

SCOTT L. MOZIER, PE, City Engineer/Assistant Director
Public Works Department, Traffic and Engineering Services Division

SUBJECT: ADOPT A RESOLUTION OF THE COUNCIL OF THE CITY OF FRESNO AUTHORIZING AN ASSIGNMENT AND ASSUMPTION AGREEMENT BETWEEN THE CITY OF FRESNO AND THE FRESNO METROPOLITAN FLOOD CONTROL DISTRICT (FMFCD) FOR THE FANCHER CREEK FLOOD CONTROL IMPROVEMENTS GRANT INCLUDING ALL RIGHTS, OBLIGATIONS AND LIABILITIES TO THE DEPARTMENT OF WATER RESOURCES (DWR) STORMWATER FLOOD MANAGEMENT GRANT PROGRAM AND AUTHORIZE THE EXECUTION OF ALL RELATED DOCUMENTS BY THE PUBLIC WORKS DIRECTOR OR HIS DESIGNEE (PROJECT LOCATED IN COUNCIL DISTRICT NO. 5)

Presented to City Council

Date 12/8/11

Disposition Res 2011-242

RECOMMENDATION

Staff recommends that the Council adopt a resolution authorizing an assignment and assumption agreement between the City of Fresno and the Fresno Metropolitan Flood Control District (FMFCD) for the Grant including all rights, obligations and liabilities to the Department of Water Resources (DWR) Stormwater Flood Management Grant Program and authorize the execution of all related documents by the Public Works Director, or his designee.

EXECUTIVE SUMMARY

On April 14, 2011, the Council adopted Resolution 2011-66 authorizing the submission of a grant application to the California Department of Water Resources (DWR) to obtain stormwater flood management grant program funding through Proposition 1E for the Fancher Creek flood control improvements project. On September 21, 2011, the DWR notified the City of Fresno of its intent to award \$2,231,086 funding through their Draft Funding Recommendation. City staff finds that it is in the best interest of the City if FMFCD the co-applicant on the project assume full responsibility of the grant. Staff has met and discussed the transfer with both FMFCD and DWR. All parties are in agreement for the City to assign and for FMFCD to assume full responsibility for the grant and the completion of the project.

BACKGROUND

On April 14, 2011, Council adopted resolution 2011-66 authorizing the submission of a grant application to the DWR to obtain stormwater flood management grant program funding through

REPORT TO THE CITY COUNCIL

Fancher Creek Prop 1E Stormwater Grant Assignment and Assumption

December 8, 2011

Page 2

Proposition 1E for the Fancher Creek flood control improvements project. The project is to be the first phase of an integrated flood and stormwater control, recharge, water quality, recreation and habitat management plan developed for Fancher Creek. It includes improvements to local stormwater facilities in order to:

1. Provide adequate capacity for underserved neighborhoods;
2. Remove direct discharges to Fancher Creek
3. Increase recharge capacity within recharge/retention ponds;
4. Provide stormwater and irrigation facilities for future planned development;
5. Further comply with the goals and objectives of Fresno's NPDES Municipal Storm Water Quality Management Program.

On September 21, 2011, the DWR notified the City of its intent to award \$2,231,086 funding through their Draft Funding Recommendation. This amount represents 50% of the total project costs. The other 50% is provided by FMFCD for a total of \$4.3 million.

City staff has discussed the project with FMFCD and finds that it would be in the best interest of the city to assign the grant to FMFCD for the following reasons:

- The system that will be constructed will be owned and maintained by FMFCD.
- The design parameters will be those of FMFCD.
- Construction will have restrictions (FMFCD restrictions) that may be better coordinated with-in their own organization. These restrictions may increase construction cost if not properly coordinated.
- Because 100% of the project pertains to FMFCD facilities, the City's administrative costs can be avoided by having FMFCD manage the grant in conjunction with the plan review and project oversight they are already providing.

The DWR does not have any problem reassigning the grant as long as the City authorizes them to do so, and the new assignee, FMFCD has the capacity and agrees to accept the grant funds and assume all rights, title, interest, obligations and assignments set forth in the grant application. A draft Assignment and Assumption Agreement has been prepared and approved by FMFCD and is attached.

FISCAL IMPACT

No City funds will be involved. FMFCD has committed matching funds through the grant application and as the managers of the project, will be responsible for the additional maintenance.

ASSIGNMENT AND ASSUMPTION AGREEMENT
(DWR-IRWM Stormwater Flood Management Grant Program)

(Fancher Creek Flood Control Improvements)

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Recitals

A. Pursuant to its Resolution No. 2011-66, the Assignor has submitted its April 15, 2011 application, attached hereto and incorporated herein by this reference (Application) to the DWR to obtain Stormwater Flood Management Grant Program (Program) funding for the Fancher Creek Flood Control Improvements Project (Project), whereunder Project improvements are to be accepted by the Assignee upon completion; and

B. On or about September 21, 2011 DWR informed Assignor and Assignee of its intent to award grant funds in the amount of \$2,231,086.00 subject to execution of a grant agreement; and

C. Assignor desires to assign the Application including all rights, obligations and liabilities thereunder to Assignee and Assignee desires to assume such from Assignor, upon the terms and conditions hereunder; and

D. Assignee understands that upon assignment of the Application hereunder, Assignee will be solely responsible for executing any grant agreement required by the DWR for delivery of grant funds and will be solely responsible for complying with all of the terms of said grant agreement; and

C. DWR is willing to consent to such assignment and assumption of the Application in the public interest, upon the terms and conditions herein.

NOW THEREFORE, for good and valuable consideration, the receipt and adequacy of which are acknowledged, Assignor and Assignee agree as follows:

Section 1. Assignment of Application.

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Section 2. Assumption of Obligations under the Agreement.

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Section 3. Assignor's Covenants.

Assignor covenants that this Assignment constitutes the only assignment it has entered with regard to the rights it possesses under the Application.

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If any litigation arises out of this Assignment or concerning the meaning or interpretation of this Assignment, the Assignee shall pay for costs and expenses of Assignor with respect to this litigation, including without limitation, reasonable attorneys' fees.

Section 5. Indemnification.

Assignee indemnifies and holds harmless Assignor from and against any loss, cost, or expense, including attorneys' fees relating to the Application including without limitation the Program, the Project, Project funding, Project match funding, and any failure of Assignee to fulfill obligations under the Application or under any grant agreement related to the Application entered into between the Assignee and DWR.

Section 6. Successors and Assigns.

This Assignment shall be binding on and inure to the benefit of the parties to it, their heirs, executors, administrators, successors in interest, and assigns.

Section 7. Governing Law.

This Assignment shall be governed by and construed in accordance with California law.

Section 8. Effective Date.

This Assignment shall be effective on the date

- (i) the Assignor's Council approves it, and
- (ii) its complete execution by the Assignor and the Assignee, and
- (iii) DWR consents to it.

Section 9.

This Assignment represents the entire and integrated agreement between the parties with respect to the subject matter hereof and supersedes any and all prior negotiations, representations or agreements, either written or oral.

Section 10. HUD Provisions.

In no event shall DWR have any liability under the terms of this Assignment.

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IN WITNESS WHEREOF, the parties have executed this Assignment.

ASSIGNOR:
CITY OF FRESNO,
a California municipal corporation

ASSIGNEE:
FRESNO METROPOLITAN FLOOD
CONTROL DISTRICT, a California public
corporation

By: _____
(Attach notary certificate of acknowledgment)

By: _____
(Attach notary certificate of acknowledgment)

Name: _____

Name: _____

Title: _____

Title: _____

Date: _____

Date: _____

ATTEST:
REBECCA E. KLISCH
CITY CLERK

By: _____
Deputy Date

APPROVED AS TO FORM:
JAMES C. SANCHEZ
CITY ATTORNEY

By: _____
John Fox Date
Senior Deputy

CONSENT BY THE CALIFORNIA DEPARTMENT OF WATER RESOURCES

The CALIFORNIA DEPARTMENT OF WATER RESOURCES consents to the Assignment to Assignee of the Application hereinabove referenced and attachments thereto and documents and certifications therein, and upon such assignment and assumption Assignor shall be automatically released from any and all obligations and liabilities whatsoever under the Application.

California Department of Water Resources

By: _____

Name: _____

Title: _____

Date: _____

Attachment : Application